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Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	MM Docket No. 95-31
	)	
Reexamination of the Comparative	)	
Standards for Noncommercial	)	
Educational Applicants	)	

**FURTHER NOTICE OF PROPOSED RULE MAKING****Adopted: October 7, 1998****Released: October 21, 1998****Comment Date:** [45 days after publication in the Federal Register]**Reply Date:** [65 days after publication in the Federal Register]

By the Commission: Commissioners Furchtgott-Roth and Tristani issuing a joint statement

1. The Commission issues this Further Notice in an ongoing effort to improve the process of choosing among competing applicants for noncommercial educational ("NCE") broadcast stations.<sup>1</sup> In earlier stages of this proceeding, commenters urged us to modify existing NCE selection procedures, but the comments revealed no apparent consensus on alternatives. Thereafter, Congress specifically retained our authority to conduct lotteries for noncommercial educational broadcast applications, while simultaneously revoking lottery authority in other broadcast services. We issue this Further Notice to solicit comment on the possibility of using lotteries to award NCE spectrum, an option not previously discussed. Based on our review of comments filed in this proceeding, we also propose specific criteria were we to adopt a point system alternative to award NCE spectrum. That alternative would assign points to various characteristics of each applicant's proposal and award the permit to the

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<sup>1</sup> Competing (also known as mutually exclusive) applications are timely filed applications for the same or adjacent channels whose uses would impermissibly interfere with each other. Competing applications can arise in several contexts, such as (1) when multiple applicants apply to be licensed for a new station on the same channel; (2) when the licensees of two or more existing stations all wish to make major modifications to their facilities (e.g. a change in the community of license or a change in coverage of over 50%) but it is not technically feasible to grant all of the requests; and (3) when an application for a new station conflicts with an application for a major change to an existing station. See 47 C.F.R. § 73.3573(a)(1) (defining major change). See generally Florida Institute of Technology v. FCC, 952 F.2d 549, 550 (D.C. Cir. 1992) (describing the manner by which NCE applications become mutually exclusive). See also Notice of Proposed Rule Making, Streamlining of Radio Technical Rules, MM Docket No. 98-93, 13 FCC Rcd \_\_\_\_ (1998) (proposal that fewer changes to AM, FM reserved, and FM translator facilities be considered major).

applicant receiving the highest score. Finally, we discuss several procedures that might be used to award spectrum not specifically reserved for noncommercial educational use but for which NCE entities may apply pursuant to Sections 73.201(radio) and 73.606 (TV) of our rules.

## I. BACKGROUND

2. Most organizations that want to operate noncommercial educational television, radio, and FM translator stations apply for specific channels that the Commission reserves exclusively for the use of noncommercial educational stations. See 47 C.F.R. § 73.501(radio) and 73.606 (TV). A wide variety of entities may be eligible to apply for these channels, including schools, churches, educational divisions of state and local governments, and not-for-profit corporations and foundations.<sup>2</sup> Applicants must demonstrate that they meet basic eligibility requirements, which we do not propose to change. See 47 C.F.R. § 73.503 (radio) and § 73.621 (television). Alternatively, applicants that are eligible as noncommercial entities can elect to operate on the remainder of the broadcast spectrum which, although not specifically reserved for NCE use, is also available to them. See generally 47 C.F.R. §§ 73.201 and 73.606. We address herein, how the Commission will select one permittee when (1) there are multiple eligible NCE applicants on NCE spectrum, and (2) when NCE entities are among the applicants competing for commercial spectrum.

3. Existing Selection Process. With respect to reserved band NCE spectrum, for the past 30 years, the Commission has convened traditional evidentiary hearings before administrative law judges to select among competing applicants. The criteria used in these hearings were established in 1967, and differ from those applied in choosing among applications for the commercial spectrum. The primary factor considered in traditional NCE hearings is "the extent to which each of the proposed operations will be integrated into the overall educational operations and objectives of the respective applicants." See New York University, 10 RR 2d 215, 217-18 (1967). The judge can also consider whether "other factors" in the record demonstrate that one applicant will provide a superior noncommercial educational broadcast service. Id.; See also Carnegie-Mellon Student Government Corporation, 7 FCC Rcd 3914, 3915-16 (1992). These other factors include areas and population served, hours of operation, and promises to install auxiliary power equipment.<sup>3</sup> The hearing judge has considerable

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<sup>2</sup> NCE stations must promote a primarily educational purpose and not air commercials. Within those limits, there are many programming choices on NCE stations, such as instructional programs, programming selected by students, bible study, cultural programming, in-depth news coverage, and children's programs such as Sesame Street that entertain as they teach.

<sup>3</sup> Another previous NCE criterion (the manner in which the proposed operation of the respective applicants meets the needs of the community to be served) was eliminated due to elimination of formal ascertainment studies. See Real Life Educational Foundation of Baton Rouge, Inc., 6 FCC Rcd 2577, 2578 (Rev. Bd. 1991) citing Program Policies and Reporting Requirements Related to Public Broadcasting Licensees, 98 FCC 2d 746 (1984).

discretion to determine which applicant is best, and explains his conclusions in a written decision. In the event of a tie, the judge may require NCE applicants to share the channel, with each operating part time. See generally 47 C.F.R. § 73.1715. Commenters to this proceeding, and even some of our decision makers,<sup>4</sup> have criticized the existing hearing procedures as too costly, too time consuming, and as being based on selection criteria that often focus on trivial distinctions between applicants.

4. The selection criteria applied to noncommercial educational applicants who choose, for whatever reason, to apply to operate on non-reserved spectrum has been different. Because such applicants would be competing with commercial applicants, and would be free to operate commercially if they so wished, the Commission has required all non-reserved band applicants to follow the rules applicable to commercial stations. Prior to our recent establishment of spectrum auctions for commercial applicants, traditional comparative hearings were used to award licenses on commercial spectrum. All applicants in those hearings, commercial and noncommercial, were compared under the "commercial" criteria, which are different from those used on reserved NCE spectrum. See Comparative Selection, MM Docket No. 97-234, FCC 98-194 (August 18, 1998) at para 2, citing Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 (1965).

5. History of This Proceeding. Interest in changing the licensing process on reserved NCE frequencies began in the early 1990's. In 1991, the Commission's Review Board described the existing NCE criteria as "vague" and "meaningless," and indicated that it was often difficult for it to expound a rational choice in noncommercial licensing cases. Real Life Educational Foundation of Baton Rouge, Inc., 6 FCC Rcd 2577, 2580, n.8 (Rev. Bd. 1991). Shortly thereafter, a federal court reached similar conclusions with respect to the core criterion used to evaluate commercial applications, in a line of cases known as the Bechtel decisions.<sup>5</sup> As a result, we initiated a broad inquiry into possible changes for both the commercial and noncommercial broadcast selection processes.<sup>6</sup> The noncommercial and commercial aspects of the inquiry were later separated, so that commenters could focus in greater depth on the noncommercial issues. Notice of Proposed Rulemaking, MM Docket No.

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<sup>4</sup> See para. 5 *infra*.

<sup>5</sup> Bechtel v. FCC, 957 F.2d 873 (D.C. Cir. 1992); after remand to FCC 10 F.3d 875 (D.C. Cir. 1993) (Bechtel) (overturning as unsupported by evidence of benefit, the integration credit, a major comparative factor used in commercial proceedings, which favored applicants proposing to work full-time at their station).

<sup>6</sup> See Notice of Proposed Rulemaking, Reexamination of the Policy Statement on Comparative Broadcast Hearings, GC Docket No. 92-52, 7 FCC Rcd 2664 (1992); Further Notice of Proposed Rulemaking, 8 FCC Rcd 5475 (1993); Second Further Notice of Proposed Rulemaking, GC Docket No. 92-52, 9 FCC Rcd 2821 (1994); Notice of Proposed Rulemaking, Competitive Bidding for Commercial Broadcast and ITFS Service Licenses, MM Docket No. 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, 12 FCC Rcd 22,363 (1997); First Report and Order, MM Docket No. 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, FCC 98-194 (August 18, 1998).

95-31, 10 FCC Rcd 2877 (1995) (Notice). Twenty-one commenters including colleges, religious broadcasters, government entities, and other not-for-profit educational organizations, responded to our request for NCE comments.<sup>7</sup> There is a temporary freeze on the processing of mutually exclusive NCE applications, pending the establishment of new selection criteria. See Notice, 10 FCC Rcd at 2879.

6. Legislative Initiatives. The Balanced Budget Act of 1997 ("Act") was enacted after our last opportunity to seek comment in the current proceeding. See Balanced Budget Act of 1997, Pub. L. No. 105-33, 11 Stat. 251 (1997) (Balanced Budget Act). Pursuant to explicit direction from Congress in the Balanced Budget Act, the Commission recently adopted auction procedures for mutually exclusive commercial broadcast licenses. Notice of Proposed Rule Making, Competitive Bidding for Commercial Broadcast and ITFS Service Licenses, MM Docket No. 97-234, 12 FCC Rcd 22,363 (1997); First Report and Order, MM Docket No. 97-234, FCC 98-194 (August 18, 1998) (Competitive Bidding). With respect to NCE spectrum, the Act does not grant auction authority, but specifically preserves the Commission's authority to choose NCE licensees by lottery, while simultaneously revoking that authority in commercial broadcast services. See Balanced Budget Act, § 3002(a), codified as 47 U.S.C. § 309(i)(5)(B). Thus, we believe that it is appropriate to consider the use of lotteries for NCE applications as an option on reserved band frequencies. The language of the Balanced Budget Act requires auctions for commercial licenses but prohibits auctions to resolve mutually exclusive applications for "noncommercial educational broadcast" and "public broadcast stations," as defined by Section 397(6) of the Act. The latter provision, codified as Section 309(j)(2)(C), raises questions as to whether, and under what procedures, noncommercial entities may continue to compete with commercial applicants for commercial spectrum. We discussed this issue briefly in the Competitive Bidding proceeding, and determined that we would benefit from further discussion of this issue in the present proceeding.

## II. DISCUSSION

### A. Procedures on Reserved NCE Spectrum

7. First, we address procedures to be used for applications for spectrum in the reserved band, which is the primary focus of the present proceeding. We consider below three options for comparing applicants for NCE spectrum: (1) traditional comparative hearings (the current selection method); (2) lotteries (an option that we are considering based on Congress's preserving our authority to conduct lotteries for NCE applications); and (3) a point system (an option suggested by some of the commenters). We seek comment on our tentative conclusion to select either a lottery or a point system, as described in further detail below.

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<sup>7</sup> A summary of suggestions from the comments appears in Appendix A and a list of commenters appears in Appendix D.

## 1. Traditional Comparative Hearings

8. The Balanced Budget Act requires the use of competitive bidding procedures for certain pending, and all future, mutually exclusive commercial broadcast applications, but prohibits the use of competitive bidding procedures to resolve noncommercial proceedings involving stations described in Section 397(6) of the Communications Act. Balanced Budget Act, § 3002(a) (1) (A), codified as 47 U.S.C. § 309(j)(2)(C). We are also considering whether to continue traditional noncommercial comparative hearings. The majority of comments filed so far in this proceeding favor retaining some form of comparative hearing. A few of these commenters suggest that we keep the current system entirely because, despite that system's shortcomings, it is fair to all applicants. A greater number of commenters, while assuming the continued use of traditional hearings, focus on changing the criteria used in those hearings to make them more meaningful. The primary benefit of traditional hearings, as presented in the comments, is that those hearings afford substantial discretion to Commission decisionmakers. Some commenters believe that such discretion is needed if we are to select the best licensee. However, other commenters maintain that well qualified NCE applicants can be selected by more objective methods that are simpler and less costly.

9. We have considered these views supporting retention of the existing process, but tentatively conclude that we should not continue to use traditional hearings. As we noted in the context of the commercial proceeding, traditional hearings have disadvantages which remain of concern today.<sup>8</sup> Specifically, traditional comparative hearings can be cumbersome, costly, and delay service to the public without substantial offsetting public interest benefits in terms of selecting the "better" applicant, because the selection often turns on minimal distinctions. Due to similar concerns, we question the continued advisability of using traditional hearings to select among noncommercial applicants. Although we recognize differences between commercial and noncommercial broadcasting, we tentatively conclude that elimination of traditional comparative hearings is equally, if not more, important in noncommercial proceedings, where applicants often have limited financial resources and the effects of delays and high costs are therefore amplified. These problems with traditional hearings have particular significance in the noncommercial context, as reflected in a longstanding staff practice giving educational applicants the opportunity first to resolve mutual exclusivity among themselves by making technical changes, and thereby avoid the burdens imposed by traditional hearings.<sup>9</sup> Although a few commenters suggest that we might

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<sup>8</sup> See Competitive Bidding, 12 FCC Rcd at 22365, citing Random Selection, 4 FCC Rcd 2256 (1989), terminated, 5 FCC Rcd 4002 (1990).

<sup>9</sup> Recognizing the difficulty that some competing educational applicants have bearing the costs associated with traditional hearings, it is a matter of longstanding staff practice to afford competing NCE radio applicants a 60-day period prior to hearing designation to amend their applications to remove the mutual exclusivity, such as by making technical changes or entering into share-time arrangements. See, e.g., Letter from Chief, FM Branch, Mass Media Bureau to Family Stations, Inc., In re: NEW-FM, Kingston, N.Y., Application No. BPED-881005MI, Ref. No. 8920-

reduce the burdens of traditional NCE comparative hearings by using "paper" hearings, they do not describe this process or address shortcomings with some types of paper hearings that we have noted in other communications services. For example, in choosing lotteries over paper hearings for multipoint distribution systems, we noted that paper hearings, though not as resource-intensive as full proceedings, are still cumbersome, and have taken up to two years to complete.<sup>10</sup> We believe that procedures which are simpler than traditional hearings could achieve satisfactory results, while placing fewer burdens on noncommercial applicants and conserving Commission resources. Accordingly, we tentatively reject traditional hearings in favor of using a lottery or point system for NCE applications.

## 2. Lotteries

10. In the Balanced Budget Act of 1997, Congress preserved our authority to use lotteries as a method for resolving competing applications by NCE applicants. Lotteries have both advantages and disadvantages. On the positive side, the Commission can select applicants much more quickly through a lottery process than through a traditional comparative hearing, and even more quickly than through a point system, and therefore ensure service to the public sooner. We also believe that lotteries would be less expensive to administer than traditional hearings or point systems, thereby placing fewer burdens on the financial resources of applicants and the Commission. Such benefits could be especially meaningful because, as noted above, many NCE applicants have limited financial resources. Further, the number of competing applications received in the NCE service is increasing annually, even with the processing freeze that is currently in place.<sup>11</sup> We believe that once this freeze is lifted the numbers of mutually exclusive applications will increase even more. Lotteries could be of significant benefit to us and to applicants in addressing these increased numbers of applications, and also in reducing our current backlog of almost 800 mutually exclusive NCE television and radio applications. Finally, lotteries could reduce the delays in service posed by post-decision appeals because unsuccessful applicants are less likely to appeal the results

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HC (Mass Media Bureau September 14, 1990) (giving two NCE radio applicants 60 days to remove their mutual exclusivity "to avoid sending educational applicants to hearing, if at all possible, so that the substantial delays and expenses involved in the hearing can be avoided" ).

<sup>10</sup> See Local Multipoint Distribution Service, CC Docket No. 92-297, 8 FCC Rcd 557 (1993). See also Report and Order, Interstate Rate of Return Represcription, CC Docket No. 92-134, 10 FCC Rcd 6788 (1995) (simplifying burdensome paper hearings); Second Report and Order, Selecting Among Certain Competing Applications Using Random Selection, 93 FCC 2d 952 (1983) (choosing lotteries over paper hearings in LPTV).

<sup>11</sup> As of early October 1998 there were 91 mutually exclusive applications in 28 separate proceedings for reserved NCE television channels and 699 applications in 252 separate proceedings competing for reserved NCE radio channels. The number of mutually exclusive NCE applications filed each year is growing, especially for radio. For example, of the 445 applications for new or major changes to NCE FM radio stations received in 1997, approximately 250 were mutually exclusive. Based on receipts thus far, we project that approximately 750 NCE radio applications will be filed in 1998, of which approximately 500 will be mutually exclusive.

of random selection than of a more subjective process.

11. Weighing against these potential advantages of lotteries are several unresolved legal and policy questions. For example, a lottery is a method of random selection based on chance. Some commenters, including the Association of America's Public Television Stations and National Public Radio, have previously raised concerns about the quality of public service that would be provided by applicants who had not been compared to other applicants in a more subjective manner. Arguably, however, all qualified NCE applicants, whether chosen by a lottery or by a point system, would have an incentive to offer quality service to the public in order to elicit the financial support of listeners and underwriters. We invite comment on this issue, as well as on the following issues specific to lotteries.

12. Weighting of Lotteries. The Communications Act, in order to promote the diversification of ownership, requires us to give a significant preference in any broadcast lottery to two types of applicants: (1) those who would increase the diversification of ownership; and (2) those controlled by a member or members of minority groups. 47 U.S.C. § 309(i)(3). This statutory mandate is consistent with our own historical commitment to encourage diversity of ownership and minority ownership in commercial broadcasting. See Competitive Bidding, 12 FCC Rcd at 22,398 - 402 (1997) and cases cited therein. However, the U.S. Supreme Court has held that policies granting racial preferences are subject to strict scrutiny.<sup>12</sup> The minority ownership preference required by the statute will have to surmount this constitutional hurdle. Accordingly, we invite comment on how we can develop NCE lottery preferences for minorities consistent with the applicable legal standard and whether the constitutional hurdles should deter us from using lotteries to award NCE licenses. We note that we have ongoing studies on related issues that will be relevant to the resolution of this matter. We seek comment on whether we should postpone a decision to adopt lottery procedures until such studies are completed and we provide a further opportunity for comment on those studies. We also ask, on the other hand, whether the public interest in lifting the current freeze, so that the NCE spectrum can be effectively utilized as soon as possible, militates against postponement. Finally, we urge any commenters advocating lottery preferences for minority ownership to submit empirical evidence supporting such preferences.

13. If these constitutional problems can be overcome, we would expect to weight a lottery 2:1 in favor of applicants controlled both de jure and de facto by members of minority groups.<sup>13</sup> An additional preference would be available to applicants, minority or non-minority, with neither de facto nor de jure control of any other, or few other, media of mass

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<sup>12</sup> Adarand Constructors v. Peña, 515 U.S. 200 (1995). See also Lutheran Church-Missouri Synod v. FCC, No. 97-1116 (D.C. Cir. April 14, 1998), petition for rehearing en banc denied (September 15, 1998).

<sup>13</sup> The term "minority group" includes Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders. 47 U.S.C. § 309(i)(3)(C)(ii); 47 C.F.R. § 1.1621(b).

communication.<sup>14</sup> Applicants qualifying for this second preference would receive a 2:1 preference if their owners do not have a majority interest in any other media of mass communication, or a 1.5:1 preference if they have interests in no more than three other outlets, none of which serve the community of the proposed station. No media ownership preference would be granted to an applicant with a majority interest in any other media of mass communication serving the same community as the NCE broadcast station for which it is applying, even if it is the applicant's only other media interest. These are the same weightings that have been used in past Low Power Television lotteries,<sup>15</sup> and are consistent with the statutory requirement for broadcast lotteries and its legislative history.<sup>16</sup> See 47 C.F.R. § 1.1622. The formulas for awarding preferences are reproduced as Appendix B for the reader's convenience. We seek comment on this proposal. If commenters would favor a lottery weighted for factors in addition to those specified in the statute, the commenters should identify those factors and identify the statutory basis for such additional factors. For example, if supported by a sufficiently detailed analysis and identification of a source of statutory authority from commenters, we might consider adopting an additional factor that is given less weight than the two statutory factors, and/or whose statistical impact is considered after performing the required steps outlined in Appendix B.

14. We are concerned about whether weighting of lotteries in favor of applicants owning few other stations would affect state-wide educational networks operating pursuant to state education plans. We view the development of these networks as positive. See, e.g. 47 C.F.R. § 73.502. However, if these stations are under common control, they might be placed at a disadvantage in a lottery by reducing or eliminating any preference for media diversity. Accordingly, we ask commenters to provide us with information about whether stations that are part of state-wide educational plans are generally under common control. Would the applicants for such stations generally be state-controlled entities, or independently controlled entities that might qualify for a diversity preference in their own right? To the extent that they would be deemed a single entity not entitled to a diversity preference, is this a factor that should deter us from use of a lottery?

15. Other Lottery Considerations. To award lottery diversity preferences for minority controlled entities, and entities who control few other stations, we would have to identify those in control of each NCE applicant. Determining the control of organizations is not always straightforward in the NCE context, where applicants are generally non-profit, non-

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<sup>14</sup> The term "media of mass communication" includes television, radio, cable television, daily newspapers, and other services as identified in 47 U.S.C. § 309(i)(3)(C)(i) and 47 C.F.R. § 1.1621(a).

<sup>15</sup> The Commission has concluded that, under the provisions of the Balanced Budget Act, it must award future LPTV licenses by auction. Competitive Bidding, FCC 98-194 (August 18, 1998).

<sup>16</sup> See Communications Amendment Act of 1982, S. Rep. No. 97-101, 97th Cong., 2d Sess. (1982), reprinted in 1982 U.S.C.A.N. 2237, 2291-92.



stock entities without such traditional indicia of control as stock ownership, equity, and rights to receive dividends.<sup>17</sup> See 47 C.F.R. § 1.2110(b)(2). Therefore, we seek comment on determining control of NCE applicants for purposes of lottery preferences. In lotteries for Low Power Television (LPTV) stations, which can be licensed to commercial as well as to noncommercial entities, we have based lottery preferences for noncommercial entities on the composition of the station's governing board. Second Report and Order, Selection from Among Certain Competing Applicants Using Random Selection or Lotteries, Gen. Docket No. 81-768, 93 FCC 2d 952 (1983); 47 C.F.R. § 1.1621(c). We have clarified, however, that the numerical composition of the Board, standing alone, is insufficient to warrant a lottery preference for minority ownership where nonminorities nevertheless exercise *de facto* or *de jure* control of the non-stock corporation. See Trinity Broadcasting of Florida, 8 FCC Rcd 2475, 2477, 2479 (1993) (refusing request for declaratory ruling that applicant was "minority owned" under 47 C.F.R. § 73.3555(e) because minority group members occupied majority of directorship of non-stock corporation and holding that usual indicia of *de facto* control are applicable to non-stock corporation).

16. We seek comment on whether it is appropriate to use board composition in an NCE context, for purposes of determining whether an applicant is entitled to either of the statutory lottery preferences. The current record indicates that some organizations may have charters or by-laws that require outgoing board members to be replaced with others of similar characteristics. Commenters also indicate, however, that participation on other NCE governing boards can be voluntary, honorary, or temporary, and that organizations might invite or not invite the participation of certain board members only after a licensing decision is made.<sup>18</sup> We invite comment on whether we should adopt standards to guard against manipulation of governing board membership in order to obtain a statutory preference and, if so, how.

17. We also note an effect that lotteries could have on reserved band FM translators rebroadcasting a commonly owned NCE primary station within that station's service area.<sup>19</sup> Such translators generally operate to fill in gaps in the main station's service, for example,

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<sup>17</sup> There is the possibility that a small segment of noncommercial educational stations have stockholders, stock subscribers, or holders of membership certificates. FCC Form 340, Instructions for Section II- Legal Qualifications. But see Notice of Inquiry, MM Docket 89-77, Transfers of Non-Stock Entities, 4 FCC Rcd 3403 (1989) (asking at what point we should consider a transfer of control to have occurred in non-stock organizations).

<sup>18</sup> These concerns were raised in a different context, i.e., as criticism of a proposed hearing credit for applicants whose governing boards are similar to the composition of the community. See Appendix A.

<sup>19</sup> This proceeding addresses translators only to the extent that the translators propose to operate on reserved NCE frequencies in the FM band. We recently established auction procedures for TV translators and for FM translators that operate on non-reserved spectrum. See Competitive Bidding. There are no specific frequencies for use by noncommercial educational translator stations, except in the reserved portion of the FM band.

when there are dead spots caused by an area's topography. If such "fill-in" NCE translators were included in lotteries with "out-of-area" translators proposing to import distant signals, the fill-in applicants could not get a diversity credit due to the existence of the nearby co-owned station. We do not believe that this would be a desirable result, given that the co-owned station is unable to serve all areas within its predicted contours without the translator. Under our current rules, when we are faced with such applications, "fill-in" translators are given preference over those that import distant signals, and if all applicants are equal in terms of the "fill-in" issue, then other secondary considerations are applied. See 47 C.F.R. § 74.1233(d) - (g). In the event that we elect to proceed by lottery, should we adopt two-track eligibility rules for fill-in and non-fill-in translators? Specifically, we anticipate that only fill-in translator proposals would be eligible to compete with other fill-in proposals in a lottery. Non-fill-in facilities would be eligible to compete in a lottery only if no conflicting fill-in proposals were received. We invite comment on this issue. Also, if commenters believe that lotteries have a potential adverse impact on any other particular type of applicant, we ask them to describe that impact and to suggest ways to minimize it.

18. Finally, we ask whether commenters foresee any potential for abuse or speculation in NCE lotteries. In 1989, we expressed concern that lotteries for commercial broadcast stations might generate speculative applications.<sup>20</sup> Do commenters believe that the potential for such abuse exists in the noncommercial educational service? If so, would the holding period proposed below minimize any such concerns? See paras. 30 -31 *infra*. Would a limit on the number of lotteries in which applicants can participate within a given time period, discourage the mass filing of NCE applications subject to lottery? *Id.* For example, in the LPTV service, in which applicants have also been selected by lottery, each applicant is limited to filing five applications within a particular filing window. Will the opening of specific time "windows" in which NCE applications will be accepted, limit abuse by making it less likely that applicants will file only as a response to earlier proposals, copying or relying upon the work of the first applicant who files?<sup>21</sup>

19. Lottery Procedures. For NCE lotteries, we would expect to generally use the same procedures that have been used in the past to award permits by lottery in the Low Power Television service. 47 C.F.R. §§ 1.1604 - 1.1623. For example, in the LPTV service we open filing windows at periodic intervals. During those windows applicants are limited to five applications for new stations, and an unlimited number of applications for major changes

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<sup>20</sup> See Notice, Selection from Among Competing Applicants for New AM, FM, and Television Stations by Random Selection, MM Docket No. 89-15, 4 FCC Rcd 2256 (1989); Report and Order, MM Docket No. 89-15, 5 FCC Rcd 4002 (1990).

<sup>21</sup> Under current rules, the acceptance of a noncommercial educational application announces the terms of that proposal and triggers the right for anyone else to file competing applications within 90 days. Under a window system, Commission action would open the filing period, giving an applicant the ability to file at the end of a window so as to lessen the potential for "copy cat" proposals.

to existing stations. If applications filed within a window are mutually exclusive with others so filed, we use a computer program to calculate selection probabilities for each mutually exclusive applicant based on the preferences which the applicant has claimed. Based on these calculations, every applicant is given the equivalent of one "chance" in the lottery, with additional proportional numbers of "chances" given to applicants who appear to be entitled to preferences. See Appendix B. This is accomplished by assigning each applicant a number block corresponding proportionately to their number of chances of winning (e.g., in a lottery comprised of two applicants with equal preferences, each with a 1 in 2 chance of selection, one applicant would be assigned number block 000 to 499 and the other would be assigned number block 500 to 999). Applicants are given the opportunity to correct incorrect information prior to the lottery and are required to update their applications to reflect any changes that would affect lottery weighting. A drawing is then held using numbered ping-pong balls to choose a winning number. For example, an applicant with the number block 000 to 499, would be our tentative selectee if any number within that range, such as 435, were selected. Only after selection of one tentative permittee by lottery, do we examine that proposed permittee's qualifications for grant, invite petitions to deny that proposed permittee's application, and examine issues raised in any such petition. Sometimes, without prior consideration of such matters, a lottery winner may be found unqualified or not to have been entitled to a preference which that applicant received. In such case, a second lottery is conducted. We invite comment on whether, in the event that we decide to use lotteries to award NCE construction permits, we should employ all existing LPTV lottery procedures or whether those procedures should be modified in certain ways to make them more appropriate to the NCE service. We also encourage commenters to raise any new ideas they may have about lottery procedures.

### 3. Point Systems

20. We also request comment on the use of a point system, as specifically described below.<sup>22</sup> Under such a system, the Commission would assign points to various characteristics, evaluate applications for those characteristics, and award a permit to the applicant with the highest score. Such a system has been used with success in the Instructional Television Fixed Service (ITFS), but the specific factors used in ITFS would not be applicable to NCE

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<sup>22</sup> If we decide that a point system is the most desirable option, we may need to seek legislation that would allow us to delegate to the staff the authority to examine applications pursuant to a point system. Such legislation would be necessary because a point system is technically considered a type of simplified hearing, and by statute we currently only have statutory authority to delegate authority over hearings to administrative law judges, or to individual Commissioners. See 47 U.S.C. § 155(c)(1). The Commission has been successful in obtaining a specific provision of the Communications Act permitting staff consideration of ITFS point system proceedings. *Id.* See also ITFS Processing Issues, 11 FCC Rcd 12,380 (1996).

broadcasting, due to the differing goals of these two services.<sup>23</sup> As with lotteries, discussed above, point systems are less costly, easier to administer, and faster than traditional comparative hearings. A point system would utilize more objective selection criteria than those we have used in traditional comparative hearings. But, unlike lotteries, a point system would be designed to select the best qualified applicant, rather than leaving that selection to chance. The key to the success or failure of a point system would be the factors used for comparison. If, for example, we were to choose a point system that relies on inherently subjective factors, much of the benefit of moving away from traditional comparative hearings could be eliminated. The elements of a point system would be entirely within the discretion of the Commission, unlike lotteries which must include certain statutorily mandated preferences. This might afford us greater flexibility although, as indicated below, we would likely include factors similar to the statutory lottery factors in a point system as well. Several commenters expressed support for the use of a point system. The commenters did not, however, generally agree on the factors that they would consider, on the number of points they would assign to each factor, or on what to do in the event of a tie. See Appendix A.

21. If we use a point system, we propose to award points as follows:

(A) **Local Diversity** (2 points): the principal community contour of the proposed NCE station does not overlap the principal community contour of any commonly controlled broadcast station. This factor would foster broadcast diversity by enabling the public to be served by different NCE licensees. Unlike the broader diversity preference required in lotteries, a point system could limit the preference to local diversity. We believe that state networks generally would not be disadvantaged under such an analysis. As in lotteries, however, when considering what media outlets are commonly controlled, we are presented with an issue that presents special difficulties in a noncommercial context. See para. 15 supra.

(B) **Fair Distribution of Service:** Section 307(b) of the Communications Act, 47 U.S.C. § 307(b), provides for the fair, efficient, and equitable distribution of service among communities. The Commission has found three factors especially relevant to assessing the relative needs of various communities for broadcast service. See Faye & Richard Tuck, Inc., 3 FCC Rcd 5374, 5376 (1988). We propose to incorporate these three factors into a point system by awarding points to proposals that are either:

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<sup>23</sup> ITFS is a nonbroadcast, point-to-point service, intended primarily to provide formal educational programming offered for credit to enrolled students of accredited schools. NCE broadcasting accommodates broader educational purposes. Thus, factors critical in ITFS can be of little relevance in NCE broadcasting. The Commission has determined that, pursuant to the general provisions of the Balanced Budget Act, pending and future mutually exclusive ITFS applications will be resolved by auction, unless Congress enacts legislation specifically exempting ITFS from auction. See Comparative Bidding.

- (1) the first full-time NCE aural or first full-time NCE video service received in the community (2 points);
- (2) the second full-time NCE aural or second full-time NCE video service received in the community (1 point); or
- (3) the first local service licensed to the community. (1 point)

(C) **Technical Parameters** (generally 1 point, but see note 24): the station would more broadly serve the public because there is a 10 percent or greater difference in the area and population to be served in this proposal than in a competing proposal.<sup>24</sup>

(D) **Other Factors**: We also invite comment on whether other factors should be included in a point system, as discussed further in paragraphs 23 and 24 infra.

22. We note that technical parameters, which have been considered in traditional noncommercial educational hearings, have traditionally been examined in a subjective manner, that does not provide the quantification needed in a point system. We propose to quantify as follows and request comments on our proposal. To get any points at all, a proposal would need to cover both 10% more area and 10% more people. We have tentatively decided not to base the preference on coverage of either 10% more area or 10% more people. We are concerned that, otherwise, we would not easily be able to make meaningful distinctions between stations and the relative needs of the populations they would serve. For example, we are not convinced that we should always consider as equal (1) service focussing on the large population of a city with many existing broadcast choices, but not reaching people in outlying areas who have fewer options and (2) service to people with fewer existing broadcast choices who, although living in a very large geographic area, are fewer in number due to the presence of lakes, mountains, or deserts in proposed coverage area. A judge in a traditional hearing, after considering all of the evidence presented, might more readily determine whether such applicants were technically equal, or whether one was superior to the other. In a point system, however, we believe that it would be best to award points only to applicants who demonstrate superiority both in terms of population and area, and thereby base our decision on factors more readily compared. Proposed service to a large population within a large geographic area, would generally be superior to service to either one of these, standing alone.

23. We recognize that in some NCE proceedings, no applicant will vary by 10% in technical parameters or propose a first or second service. In such cases, our proposed point system

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<sup>24</sup> An applicant who covers an area and population that is 10% greater than another applicant would receive one point. In rare instances an applicant with far superior coverage in comparison to others might get two points, if its proposal is 10% greater than a second proposal which, in turn, is 10% greater than a third proposal. In such a rare case, the first proposal would get 2 points, the second 1 point, and the third 0 points.

would turn on solely the issue of local diversity. Do commenters consider this a sufficient basis on which to select among NCE applicants? If not, do they have other carefully supported suggestions of additional criteria? Any suggested criteria should be easy to document, difficult to feign, and directly and verifiably connected to furthering a public interest goal. To support any particular suggestion, we would recommend that commenters explain the direct link between that suggestion and a public interest goal, such as why an applicant with one particular characteristic would provide a service superior to that of an applicant using another readily available method. We would especially welcome the submission of studies or other empirical evidence supporting such comments.

24. Keeping the above goals in mind, we seek comment on each of the following factors as possible additional bases for award of points. (1) Minority Control Credit: for applicants controlled both de jure and de facto by minorities in order to further diversify the NCE mass media service. We invite comment on whether we should include this factor in light of current constitutional concerns where, unlike lotteries, we are not required to include this factor by statute. If so, how might we implement this factor consistent with Adarand v. Peña?<sup>25</sup> In addition, are there racially neutral alternatives that might indirectly further our diversification goals? This factor also involves consideration of control, which as discussed in para. 15 supra, presents special difficulties in a noncommercial context; (2) Local Educational Presence Credit: giving an established local organization a credit over new or distant organizations, upon a showing that obtaining a license to operate a local station is important to achieving the established local organization's educational goals.<sup>26</sup> How long

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<sup>25</sup> See supra para. 12.

<sup>26</sup> For example, a school that has established itself at its current location for a significant period, and which will use the station as part of its curriculum to train its students in broadcasting, might be able to demonstrate that only a station in the immediate vicinity of its campus could meet its educational goals and needs. There would be a public interest in accommodating this need, especially from the perspective of efficient spectrum management. NCE spectrum is a scarce resource that can accommodate only a limited number of new entrants in a particular location. Given a choice between two NCE applicants, one that can only meet its educational goals within a small specific geographic region, and one that can operate equally well from another location, we believe it is most efficient to give a preference to the local applicant. The non-local applicant can also apply in other locations, including those where spectrum may be more readily available and, thus, the educational programming of both applicants may ultimately reach the listening public. The establishment of the applicant in the area for the specific period prior to the time of application would both help establish its need for a license at that location and reduce the potential for abuse.

We view this as very different from a local residence credit, previously considered in commercial hearing proceedings. A local residence credit, which never applied to noncommercial proceedings but which was suggested by some NCE commenters, may raise potential difficulties under Bechtel to the extent that it makes assumptions regarding the responsiveness of programming to community needs. In contrast, the local educational presence credit proposed here does not assume that a local organization is inherently better qualified to respond to local needs and interests. Rather, it is a recognition of a greater educational need by one particular applicant over another for a local broadcast license because one organization cannot fully satisfy its educational objectives outside a particular

should the organization need to be present in the local community to be considered eligible for such a credit? (3) State-Wide Plan Credit: for stations that would be part of an existing education plan of a state or municipality; or (4) Representativeness Credit: giving NCE television applicants, who must currently demonstrate that their leadership is broadly representative of the community, an extra credit if their leaders are significantly more representative than those of other applicants.<sup>27</sup> See FCC Form 340, Section II, Question 3. To the extent that commenters support any of these factors, we ask them to suggest the number of points that should be awarded.

25. Tie-Breakers. Whatever factors might be considered in a point system, we would need to determine what to do if two or more applicants receive the same number of points. Several commenters suggest that, in the event of a tie, we should award a "finder's preference" to the applicant who filed its application first. This suggestion raised concerns among other commenters, such as National Public Radio, that any award of a license based on filing date, could result in a "land rush" for noncommercial frequencies. We agree that a reward for the first to file could result in a rush to apply for all vacant NCE channels. Such an outcome would be undesirable because it could create an artificial demand to apply for such frequencies prematurely and prevent future upgrades by existing licensees. Accordingly, we tentatively reject the idea of a finder's preference for noncommercial FM and TV stations, and focus instead on other possible tie-breaker mechanisms.<sup>28</sup>

26. One tie-breaker possibility would be to require the tied applicants to share the channel. A number of commenters dislike mandatory share-time arrangements, finding them confusing to audiences, and potentially inefficient for licensees. If more than two applicants tie, there is some merit to these arguments. However, in our experience, we would expect that most ties

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geographic area.

<sup>27</sup> For example an applicant whose leaders are from five elements of the community, as traditionally considered, (e.g. businesses, civic groups, professions, religious groups, schools, government), would be more representative than an applicant whose leaders represent four such elements. These elements were most succinctly articulated in a "Community Leader Checklist" that broadcast licensees once used to ensure that they consulted with a wide cross-section of the community to formally ascertain the community's needs. See Ascertainment of Community Problems by Broadcast Applicants, 41 Fed. Reg. 1372, 1384 (January 7, 1976). Although we no longer require formal ascertainment, the elements themselves continue to be used to determine whether television applicants are broadly representative. As a basic eligibility question on FCC Form 340, television applicants who are educational organizations (like non-profit corporations formed to apply for broadcast licenses), must make this showing. However, governments and educational institutions (like colleges and schools) which are in existence for broader purposes are presumed to be broadly representative. If the Commission were to use this as a selection factor, we would propose to incorporate the elements into our rules.

<sup>28</sup> We might, however, consider a first come, first served tie breaker for NCE FM translator stations, because a rush for frequencies is less likely in that secondary service. Consideration of filing date is one of several factors currently used to resolve competing translator applications. 47 C.F.R. § 74.1233(g).

would involve only two applicants. In such cases, should we give two equally qualified applicants an equal opportunity to use the channel, with the understanding that they might reach another mutually acceptable arrangement between themselves at a later date? For example, if equal sharing of time was unacceptable to the applicants, they could negotiate with each other to reach a different arrangement that would meet their own individual needs, up to and including one applicant's relinquishing all of its time to the other. See 47 C.F.R. § 73.561; Nassau Community College, 12 FCC Rcd 12,234 (1997) (licensees permitted to modify time sharing arrangements at their discretion upon notification to FCC, even if the result is voluntary elimination of one station). If we adopt this option, we propose that the applicant would not be permitted to receive consideration greater than its reasonable and prudent expenses in return for any such relinquishment of time, unless the applicant had been operating on-air for a minimum holding period, as discussed in paras. 30-31 below.

27. A second option would be to use a tie-breaker lottery, weighted in accordance with statutory requirements. Although, as discussed above, we are seeking comment on concerns that we have about lotteries as a primary selection system, we have fewer concerns about using lotteries as tie-breakers. This is because a narrower class of applicants would be eligible to participate in tie-breaker lotteries, i.e. those who had already been found equally qualified under a point system. Nevertheless a few of our original concerns remain, especially those related to the statutory requirement that broadcast lotteries be weighted to favor applicant diversity and minority ownership. Would commenters consider a tie-breaker lottery preferable to mandatory time sharing? Should a tie breaker lottery be held only if the tie is between three or more applicants (with another method, such as timesharing, used for two-way ties)?

28. A third possibility would be to use another secondary factor to break a tie. In the ITFS service, for example, we have considered, as a tie breaker, which station would serve the largest number of students. Third Report and Order, Instructional Television Fixed Service, MM Docket No. 83-523, 4 FCC Rcd 4830 (1989). This particular tie-breaker would not be equally applicable to NCE stations, which potentially have much broader goals than ITFS stations, and might not be limited to serving a student population. Might there, however, be some other factor that could serve as an NCE tie-breaker, such as one of the factors that we have mentioned in paragraph 24 above (i.e., credits for local presence, state-wide plans, or representativeness of leadership)? What further tie-breaking measures might we use if there is still a tie after consideration of this secondary factor? We request comment on all three of these tie-breaker proposals or any others a commenting party may wish to suggest.



#### 4. Holding Period

29. Congress encourages us to devise measures to ensure that any preferences embedded in our application selection processes and the purposes such preferences are intended to serve, are not undermined by the rapid re-assignment or transfer of stations. See Communications Amendments Act of 1982, S. Rep. No. 97-191, 97th Cong., 2d Sess. (1982), reprinted in 1982 U.S.C.C.A.N. 2237 at 2289 ("1982 Lottery Guidelines"). Six commenters addressed the possibility of a "holding period" for NCE stations granted on a comparative basis, as a means of protecting the integrity of these grants. Most of these commenters agree that NCE licensees should be required to hold stations for some minimum period of time. They say, for example, that our new selection criteria might become meaningless if the prevailing applicant could immediately transfer the station to another entity. Commenters, such as the National Federation of Community Broadcasters, also state that a holding period would address the Bechtel court's concerns (raised in a commercial context) by requiring licensees to remain true to their comparative promises. American Family Radio further states that a holding period is needed to limit speculation. The commenters differ on the amount of time that they believe is an adequate holding period, with suggestions ranging from one year to seven years. The University of Arizona would support a holding period only if exceptions can be made, such as when funding requires restructuring.

30. We tentatively conclude that there should be a holding period for NCE licenses awarded on the basis of a lottery preference or point system. We do not propose a holding period for licensees receiving no such preference (such as single applicants, licenses awarded through settlement, or licenses awarded to an applicant that received no preferential weighting in a lottery). This tentative conclusion is based on our belief that if applicants are to be selected on the basis of their different characteristics, those characteristics should be maintained for a minimum period of public service to be meaningful. We also believe that a holding period has the ability to limit any speculation that might accompany a new selection system, especially one that is faster, simpler, and less costly for applicants. To further deter speculation, we would also require the prevailing applicant to certify that they have not entered into any agreement or option, explicit or implicit, to transfer to another party any station construction permit or license awarded. See generally 1982 Lottery Guidelines, 1982 U.S.C.C.A.N. at 2290. During the holding period, prevailing applicants would be required to certify annually their continued eligibility for the preferences and points they received. As Congress has indicated in its discussion of lotteries, if those eligible for preferences were simply applying for licenses for the purpose of obtaining a quick profit on the sale of the station once the license is awarded or the holding period ends, the entire preference mechanism would be undermined. *Id.*

31. We do not at present propose a specific length for the holding period, because we would like to receive comment from NCE organizations on several possibilities. One option would

be to establish a holding period of five years of on-air operations. This is similar to a provision in the commercial Competitive Bidding proceeding, that applicants who receive monetary bidding credits in an auction would be required to repay the amount of those credits plus interest, as prescribed in the Commission's Part I auction rules, as a condition of Commission approval of the assignment or transfer within five years to an entity not meeting the eligibility criteria for the bidding credit. See Competitive Bidding at para. 194. Should we require that an NCE organization that assigns or transfers control of its broadcast station prior to five years of operations be allowed to recoup no more than its legitimate and prudent expenses? If commenters do not believe that a five year period would be appropriate for noncommercial entities, they should thoroughly explain their reasoning and propose an alternate time period. For example, would they favor a holding period of three years, similar to the three year holding period that existed prior to elimination of our anti-trafficking policy? See Elimination of Three Year Rule and Underlying Anti-Trafficking Policy, 52 RR 2d 1081 (1982), reconsidered in part, 99 FCC 2d 971 (1985). Commenters, in considering various holding periods, should be aware that the Bechtel court, in the commercial context, indicated that a one-year holding period for applicants chosen in traditional comparative hearings was too short to bring about its perceived goals.<sup>29</sup> See 47 C.F.R. § 73.3597(a).

32. If applicants need to transfer a station prior to the holding period selected, and such station was awarded pursuant to a comparative preference, we would expect that the licensee would be limited to recoupment of its reasonable and prudent expenses. Currently we have such a requirement for applicants seeking to transfer the permits for unconstructed broadcast stations, both commercial and noncommercial. In the context of an unconstructed station, we consider as reimbursable the permittee's reasonable expenses of obtaining the permit and the cost of any partial construction efforts. Extending this concept to NCE stations that have been built and are operating raises a question of how to define reasonable and prudent expenses in a new context. Which, for example, among the following expenses should be included: costs of preparing and prosecuting the application for construction permit; costs of station construction; all costs of station operation; costs of station operation only to the extent that the costs are not offset by the station or organization's income? Should salaries paid to the board of directors of an operating station be excluded? Given our goals of decreasing the potential for speculation, and of retaining the public benefit of selection criteria for a reasonable time, what other costs should be either included or excluded?

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<sup>29</sup> See Bechtel, 10 F.3d at 879. Moreover, the Bechtel court, in dicta, stated that even a three year holding period might be insufficient to support a credit for owner-managers, but this view appears to have been based on an additional factor not present in the current context, i.e. an earlier FCC indication that the integration credit was expected to bring about permanent benefits. See Bechtel, 10 F.3d at 880. The noncommercial point system proposed herein is an attempt to bring about an overall benefit to the public, through a combination of factors, some long term, others serving to get the station started in a good direction and lasting for a period of time long enough to be meaningful to listeners and to deter speculators from entering noncommercial educational broadcasting.

33. Finally, how should we address changes in a station's board of directors in the context of a holding period? While we can address potential assignment of a station's license by limiting a station's sales price during a holding period, we cannot address the possible resignation of board members in this same way. Nevertheless, it would be problematic to us to select a particular organization based on the diversity of its governing board, only to have the de facto or de jure control of that organization change shortly thereafter. We seek comment on how to address this issue. Should we, for example, award diversity preferences only to organizations whose own governing documents specify board diversity (e.g. if the organization itself addresses whether existing and incoming board members can have other media interests)? What other measures might the Commission adopt to ensure that a lottery or point preference awarded to promote diversification is a meaningful licensing criterion?

#### B. Noncommercial Educational Applicants on "Commercial" Frequencies

34. In the past, the Commission has permitted noncommercial educational entities also to apply for spectrum not specifically reserved for noncommercial use, i.e., for "unreserved" or "commercial" frequencies.<sup>30</sup> All applicants competing for commercial broadcast spectrum, including any NCE applicants seeking such channels, are required to compete under the rules applicable to commercial applicants.<sup>31</sup> In the commercial Competitive Bidding proceeding, the Commission therefore initially proposed that NCE applicants could continue to apply for commercial spectrum in the new auction environment by participating in spectrum auctions, along with commercial applicants.<sup>32</sup> Competitive Bidding, 12 FCC Rcd at 22,383. Some commenters in the commercial proceeding, however, argued that such action would place NCE applicants at a financial disadvantage and would be inconsistent with language in the Balanced Budget Act exempting noncommercial stations from auctions. We did not receive sufficiently focused comment to resolve this difficult issue in the commercial proceeding. Therefore, in Competitive Bidding, we postponed resolution of this question and stated that

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<sup>30</sup> In contrast, commercial applicants are not eligible to be considered for noncommercial frequencies:

<sup>31</sup> See, e.g., Central Michigan University, 7 FCC Rcd 7636, 7637 (1992) (purpose of subjecting both noncommercial and commercial applicants for unreserved channels to the same filing and processing requirements "was to ensure comparable treatment of similarly situated applicants"); Memorandum Opinion and Order in Docket No. 20418, 90 FCC 2d 160, 179-180 (1982); Reservation of Channel 13 in Eureka, California, 7 RR 2d 1593, 1597 (1966); Channel Assignments in Wilmington-Atlantic City, 18 RR 1653, 1661-62 (1959) (declining to reserve "commercial" television channel for educational use and stating that educational entities could apply for use of unreserved channel on comparative basis with commercial applicants); Josephine Broadcasting Limited Partnership, 5 FCC Rcd 3162 (Audio Serv. Div. 1990); Viera & Lloyd, 5 FCC Rcd 5813 (Audio Serv. Div. 1990); Georgia Public Telecommunications Commission, 4 FCC Rcd 6357 (Audio Serv. Div. 1989) (designating for hearing mutually exclusive applications for FM stations on unreserved channels where applicants included both commercial and noncommercial entities).

<sup>32</sup> For example, all TV translators must operate on commercial frequencies since none are allotted to reserved channels.

we would seek additional comment in this rulemaking proceeding. See FCC 98-194, at para. 25.

### Statutory Construction

35. At issue is the language of Section 309(j)(2)(C) of the statute, which provides that competitive bidding "shall not apply to licenses or construction permits issued by the Commission ... for stations described in section 397(6)" of the Communications Act. Section 397(6) defines the terms "noncommercial educational broadcast station" and "public broadcast station." Some parties to the commercial proceeding read this language to mean that auctions cannot be used any time there is the potential that a license may be awarded to an NCE station. Under this view, mutually exclusive applications filed by NCE entities are exempt from competitive bidding, regardless of whether the frequency applied for is also available to competing commercial applicants. See Competitive Bidding, FCC 98-194, at para. 22. Other participants in the commercial proceeding, however, read the statute as prohibiting auctions only when the Commission knows in advance with a certainty that the ultimate licensee will be an NCE entity. *Id.* at para. 23. Under this interpretation, auctions are prohibited only if a reserved frequency is involved or if NCE entities are the only applicants for a particular commercial frequency. We seek additional comment on these or other possible interpretations of the statutory language, in relation to our authority to develop procedures for selecting among mutually exclusive applications on commercial channels. The universe of options available to us will necessarily depend upon how we resolve this issue.

### Auction Options

#### 1. Current or Modified Auction Procedures

36. If the statute permits NCE applicants to participate in auctions for commercial channels, one option would be to proceed as originally proposed, *i.e.* commercial and NCE applicants would compete for commercial frequencies under the same general procedures recently adopted in the Competitive Bidding proceeding. Alternatively, we could modify those procedures somewhat when an NCE entity was involved. For example, there are certain bidding credits available to all applicants for commercial channels. Should there also be a specific bidding credit for NCE entities? If so, what should that credit be? Would the credit be available to all NCE applicants or only to certain categories, *e.g.*, those below a certain funding level? Should we consider any other special procedures to enhance fair competition in auctions between NCE and non-NCE entities, if such auctions are consistent with the statute?

#### 2. Reserving Additional Spectrum for NCE Use

37. Another possibility would be to auction commercial spectrum using the current or

modified procedures described above, but to counterbalance any perceived competitive disadvantage NCE applicants might face by making it easier for an NCE entity to request reallocation of a commercially available channel to one available only to NCE applicants. We note that a significant portion of the spectrum is already reserved for NCE use.<sup>33</sup> However, we are sensitive to the fact that some noncommercial educational radio and television stations may, for technical reasons, have no choice but to operate on unreserved frequencies. Currently, we allow NCE entities to reallocate spectrum from non-reserved to reserved through a rulemaking process in only two limited circumstances. Specifically, we permit reallocation when reserved band frequencies are unavailable due to potential interference to either: (1) foreign allocations (Canadian or Mexican) or (2) operations on VHF television Channel 6.<sup>34</sup> Should we also consider recognizing a third circumstance in which commercial spectrum might be reallocated for NCE use and, therefore, exempt from the auction process, based on a showing of strong public need? One such possibility would be to grant specific reallocations if (a) the NCE entities would be precluded from serving their proposed communities of license using the reserved band by existing reserved band stations or pending applications, and (b) the proposed allotment would provide the first or second NCE aural or video service received in the community.<sup>35</sup> What is the extent of relief that would be obtained through this proposal? Are there any other circumstances under which we should consider reallocating commercial channels for noncommercial use? If commenters would support a reallocation option, how can we minimize the impact of studying these presumably detailed NCE submissions and related pleadings on the staff, on other applicants, and on the auction process in general? How would this option potentially impact the development of digital television? Should the option, if adopted, be limited to the AM and FM broadcast services because of any such potential impact? Should any frequencies in the commercial band, that we might reallocate for noncommercial use pursuant to this option, always remain reserved? Alternatively, should such frequencies return to the commercial band if the NCE licensee seeks to transfer the station to a commercial operator? What procedures should the Commission implement to ensure the integrity of the allotment process and promote the noncommercial service?

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<sup>33</sup> In the FM service 20 specific channels (87.9 MHz to 91.0 MHz) of a total of 100 channels are currently reserved for NCE use. 47 C.F.R. §§ 73.201 and 73.501. In the television service a similar proportion of channels are reserved for NCE use, but using different channels in different geographic areas. For example, in Alabama, 15 of 54 analog TV channels and 9 of 40 digital TV channels are reserved for NCE use. 47 C.F.R. §§ 73.606 and 73.621.

<sup>34</sup> See, e.g., Lindside, West Virginia, 2 FCC Rcd 6046 (Alloc. Br. 1987); Burlington and Newport, Vermont, 45 RR 2d 786 (Broad. Bur. 1979); Presque Isle, Maine, 36 RR 2d 840 (Broad. Bur. 1976).

<sup>35</sup> This might occur, for example, if existing NCE stations that serve large population centers are not serving smaller outlying communities, and another NCE entity wants to provide the first or second NCE service to those smaller communities without causing interference to the existing stations.

## Non-Auction Options

38. We also present several other options for discussion. If, for example, we conclude that the statute precludes participation of NCE entities in auctions for commercial channels, would commenters support any of the options below, or suggest other non-auction approaches?

### 1. Ineligibility

39. One option would be to find NCE entities ineligible for non-reserved channels altogether. Such an option would be a departure from current policy, but could be a simple way to resolve the conflict in a statute that might both require auctions of commercial spectrum and preclude NCE applicants from participating in such auctions. We invite comment on the impact of such a decision on NCE applicants. For example, are there some NCE entities who might prefer participating in spectrum auctions with commercial entities to being foreclosed from applying for commercial spectrum? What options would be available to them if NCE entities were ineligible to participate in auctions? Should we expand their opportunities to reallocate some commercial channels for NCE use as described in para. 37 above? What are the views of NCE stations already operating on commercial channels? We tentatively conclude that there would be no significant impact on such stations because the existing operations of those stations would be grandfathered and our existing rules, allowing one-step upgrades by existing licensees on commercial channels, would generally allow them to upgrade without competing with other applicants.

### 2. Special NCE Processing Track

40. The Association of America's Public Television Stations suggested, in the commercial proceeding, that we should establish a separate processing track for NCE applications for commercial spectrum. According to that plan, once a technically acceptable application is filed for a commercial channel by a noncommercial applicant, the channel would be deemed reserved for noncommercial educational use and only other noncommercial applicants would be permitted to file. The prevailing NCE applicant would then be selected using whatever procedure we decide to use when NCE entities file mutually exclusive applications for a reserved channel.

41. A consequence of this suggested approach might be the reallocation of commercial channels to noncommercial use, whether or not alternative noncommercial channels are available.<sup>36</sup> We seek comment on the impact of this approach on current and future commercial uses. Do commenters project the filing of increased numbers of NCE

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<sup>36</sup> For example, an NCE entity desiring to operate on the AM band (in which no channels are reserved for NCE use) might apply for the last commercial AM channel available in an area, precluding its commercial use, instead of using one of several available FM channels reserved for NCE stations.

applications for unreserved channels? Would it be consistent with Congressional intent to remove commercial spectrum from the auction block without regard to the level of public need?

42. We also note that noncommercial permittees and licensees on commercial frequencies can convert to commercial stations simply by modifying their permit or license. 47 C.F.R. § 73.1690(c)(9). Thus, it might be possible for an NCE applicant to obtain commercial spectrum at no cost, build, and then sell privately to a commercial entity that would otherwise have been subject to an auction. Could holding periods or some other mechanism address this issue? Should we make it more difficult for stations operating on commercial channels to convert from NCE to commercial operations, if their licenses were first awarded after the effective date of our auction authority?

### 3. Hybrid Approach

43. Yet another option would be to adopt some form of hybrid procedure. For example, when both NCE and commercial entities are competing for a commercial frequency, we might first hold a lottery, with statutory diversification and minority preferences. If a noncommercial educational entity wins the lottery, it would get the license, assuming that it is otherwise qualified. If, however, a commercial entity (which is precluded by statute from receiving a license awarded by lottery) "wins," this would be grounds for dismissal of the NCE applications and would trigger an auction in which all remaining commercial applicants would be eligible to participate. Alternatively, commercial and NCE applicants might first be compared using a point system, and proceed to auction if an NCE applicant was not selected on that basis. If an NCE station is not selected in the non-auction phase of a particular proceeding, and there is only one commercial applicant, we propose that that applicant would be awarded the license as a singleton.

44. We note that the lottery/auction hybrid raises the same minority and diversity issues discussed above in our consideration of lotteries on reserved spectrum. The point system/auction hybrid would require us to undertake the difficult task of devising a point system equally appropriate to commercial and noncommercial applicants. A few of the criteria discussed above for NCE point systems (such as local diversity and technical parameters) might equally apply to commercial applicants, but other factors (such as local educational presence and state-wide plans) are clearly inapplicable to commercial stations. The same is true for some criteria proposed by National Public Radio in the commercial proceeding.<sup>37</sup> We invite comment. Finally, we ask commenters who support a hybrid

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<sup>37</sup> NPR proposes to choose among all competing applicants on non-reserved channels by considering factors used by the National Telecommunications Information Administration to prioritize funding requests from NCE applicants. See 15 C.F.R. § 2301. This includes whether an applicant would: (1) offer a first or second NCE service, (2) have significant minority or female control or programming uniquely serving minorities or women, and (3) have significant

approach to suggest ways to prevent speculation. See para. 42 supra.

### Pending Applications

45. There are currently approximately 40 pending proceedings, in which commercial and noncommercial applicants are competing on non-reserved channels.<sup>38</sup> Should the procedures used to resolve these proceedings be the same or different from those applied to future applicants? For example, were the Commission to decide that NCE entities will no longer be eligible to apply for commercial spectrum, what procedures would apply to cases where such applications have already been filed?

## III. PROCEDURAL MATTERS

### Comments and Reply Comments

46. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on before [45 days after publication in the Federal Register], and reply comments on or before [65 days after publication in the Federal Register]. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24,121 (1998).

47. Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable

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involvement of or service to the local community, including first local origination of an NCE broadcaster in a geographic area. See Comments of National Public Radio, Inc., National Federation of Community Broadcasters and The Corporation for Public Broadcasting in GC Docket No. 92-52 at 21-23.

<sup>38</sup> In Competitive Bidding, we stated that we would not proceed to auction any cases where both noncommercial and commercial applicants have filed competing applications for nonreserved channels, but that we would resolve these cases following release of a report and order in this proceeding. See FCC 98-194 at para. 25. In the TV service, there are seven pending proceedings in which NCE applicants are competing with commercial applicants on commercial channels. In total, 16 commercial and eight noncommercial television applications are involved. All of those applications were filed prior to July 1, 1997, the date chosen by Congress as the beginning of mandatory auction of certain full service broadcast authorizations. In the FM service, there are approximately 18 groups of pre-July 1997 applications, containing approximately 92 commercial applicants and 25 noncommercial educational applicants. There are also approximately 17 mutually exclusive groups filed after July 1, 1997, containing approximately 79 commercial applicants and 20 NCE applicants.



docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and should include the following words in the body of the message, "get form <your e-mail address.>" A sample form and directions will be sent in reply.

48. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 1919 M St. N.W., Room 222, Washington, D.C. 20554.

49. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to: Irene Bleiweiss, Mass Media Bureau, Audio Services Division (Room 302), 1919 M St., N.W., Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using WordPerfect 5.1 for Windows or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labelled with the commenter's name, proceeding (including MM Docket No. 95-31), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, D.C. 20037.

50. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20554, or via the Internet to [jboley@fcc.gov](mailto:jboley@fcc.gov) and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 17th Street, N.W., Washington, D.C. 20503 or via the Internet to [fain\\_t@al.eop.gov](mailto:fain_t@al.eop.gov).

#### **Initial Paperwork Reduction Act of 1995 Analysis**

51. This Further Notice contains either a proposed or modified information collection. We anticipate that approximately 200 applicants annually for new or major modifications to noncommercial educational radio stations and 100 applicants annually for new or major modifications to noncommercial education television stations would file on a revised application form 340. The form currently takes approximately 5 hours to complete. In order to identify their eligibility for certain lottery preferences or points, applicants would need to provide some information beyond that which is currently requested. We estimate that the additional information would take approximately 1 hour to provide. However, we may be able to eliminate some of the questions currently asked for traditional comparative hearings,

thereby saving approximately 1 hour. Thus, we would not expect application preparation time for new applicants to differ significantly from that currently required. With respect to almost 800 currently pending applications for reserved channels, and approximately 240 pending applications in which NCE and non-NCE applicants are competing for nonreserved channels, those applicants would need to amend their existing applications to submit the additional preference/point information, which we expect will take an average of 1 hour per application to supply. There is the potential that the Commission may need additional information from commercial applicants on Form 301, if noncommercial and commercial entities compete under new rules for non-reserved channels. Approximately, 600 such applications are filed each year for new and major changes to FM stations and approximately 220 applications are filed each year for new and major changes to television stations. The form, when used for those purposes, took approximately 78 hours to complete in a traditional hearing context. We estimate that additional information would take approximately 1 hour to provide. However, we will likely eliminate some of the questions currently asked for traditional comparative hearings, thereby saving at least one hour, likely more. Thus, we expect that the preparation time for commercial applicants would remain the same or decrease from that currently required despite the additional information collection contained herein. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this Further Notice, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as comments on this Further Notice. OMB comments are due 60 days from the date of publication of this Further Notice in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

### **Ex Parte Presentations**

52. This is a "permit-but-disclose" notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as required by the Commission's rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

### **Regulatory Flexibility Act**

53. An Initial Regulatory Flexibility Analysis (IRFA) is contained in Appendix D to this Further Notice. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an IRFA of the expected impact on small entities of the proposals

contained in this Further Notice. Written public comments are requested on the IRFA. In order to fulfill the mandate of the Contract with America Advancement Act of 1996 regarding the Final Regulatory Flexibility Analysis, we ask a number of questions in our IRFA regarding the prevalence of small businesses in the noncommercial radio and television broadcasting. Comments on the IRFA must be filed in accordance with the same filing deadlines as comments on the Further Notice, but they must have a distinct heading designating them as responses to the IRFA. The Commission's Office of Public Affairs, Reference Operations Division, shall send a copy of this Further Notice, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 et seq. (1981), as amended.

#### Authority

54. This Notice is issued pursuant to authority contained in Sections 4(i), 303, 307, and 309(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, 307, 309(i).

#### Additional Information

55. For additional information on this proceeding, please contact Irene Bleiweiss, Audio Services Division, Mass Media Bureau, (202) 418-2780.

**FEDERAL COMMUNICATIONS COMMISSION**



Magalie Roman Salas,  
Secretary

ATTACHMENTS

## APPENDIX A

## PREVIOUSLY SUGGESTED COMPARATIVE CRITERIA

**A. Suggestion of America's Public Television Stations/National Public Radio** (This proposal, offered in a traditional comparative hearing context, received the most commenter support):

- (1) When evaluated in light of the overall proposal of the applicant, which applicant will provide a local educational program service that best serves the needs of the community?

The factors APTS and NPR deem relevant to this consideration are:

- (a) whether the governing board of the applicant is representative of the community including its racial, ethnic, and gender composition, and the various educational, cultural, and other groups in the community;
- (b) whether the applicant is integrated into the educational, cultural, social and civic organizations and institutions in the community;
- (c) whether the applicant has ascertained the educational, cultural, social and civic needs of the community and proposed a program service that is responsive to those ascertained needs and will enhance the intellectual, cultural, social and educational life of the community; and
- (d) whether the applicant has demonstrated that it has a reasonable prospect of effectuating its proposal.

- (2) Whether the applicant will increase the diversity of noncommercial educational programming to the community; and
- (3) Whether either applicant will provide service to a meaningfully larger area or population and whether either applicant will provide a first, second or third noncommercial signal to a meaningful population.<sup>39</sup>

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<sup>39</sup> APTS and NPR would give this factor more significance in radio proceedings than in television. In noncommercial radio proceedings mutually exclusive applicants can propose service to different communities and largely different areas. In television proceedings, applicants apply for allotted channels and thus it is less likely that one applicant will serve a significant unserved area that is not served by a competing applicant.

**B. Other Proposed Criteria**

Other criteria previously suggested for either a point system or traditional hearing are:

- (1) past broadcast experience including a credit for a meritorious broadcast record and a demerit for a history of not constructing;
- (2) a finder's preference or other credit for the first to file;
- (3) local ties to the community including local representation on the board of directors, local residence of station principals, and local program origination/main studio;
- (4) financial ability to construct and operate the station, including arguments that private funding is preferable to public funding;
- (5) technical considerations including spectrum efficiency, best coverage, and full power;
- (6) diversity of ownership and minority involvement;
- (7) longer operating hours;
- (8) program content that serves an unmet need and/or is different from existing stations;
- (9) objectives directed outward toward community rather than inward toward licensee;
- (10) the proposal that is best as originally filed as opposed to as the result of an amendment;
- (11) preference for stations that target small markets;
- (12) whether the applicant has an established audience;
- (13) a preference for educational institutions over educational organizations;
- (14) a preference for accredited institutions over unaccredited institutions; and
- (15) a preference for applicants seeking to effectuate a state broadcasting plan.

## APPENDIX B

The following step-by-step procedure for determining preferences in weighted lotteries was suggested by Congress in 1982. See 1982 Lottery Guidelines, 1982 U.S.C.C.A.N. 2237, 2291-92. Examples illustrating this procedure can be found therein. The rules implementing these procedures in the Low Power Television Service are found at 47 C.F.R. § 1.1622. The Commission recently proposed to change those procedures and instead to hold auctions for LPTV frequencies.

A. Divide the total number of applicants into 100 to find the individual applicant selection probabilities without adjustment for preferences.

B. Identify all applicants by ownership group according to the following table:

- |   |     |
|---|-----|
| 1. No controlling ownership interest .....  | 2.0 |
| 2. Controlling interest in 1 - 3 entities .....   | 1.5 |
| 3. Controlling interest in more than 3 entities or in at least 1<br>entity serving the city of license..... | 1.0 |

C. Multiply the selection probabilities for each applicant from Step A by the appropriate preference factor from Step B.

D. Normalize all probabilities using the following formula: Intermediate probability for each applicant equals applicant's Step C probability divided by the sum of all applicants' Step C probabilities.

E. Sum the probabilities from Step D by group. Then sum the probability totals from Groups 1 and 2. If this sum is greater than .40, skip Step F and go on to Step G. If this sum is less than .40, each applicant in Groups 1 and 2 will have its intermediate probability raised as follows:

- (1) Compute the quotient of .4 divided by the sum of the probability totals from Groups 1 and 2.
- (2) the new intermediate probabilities are then computed as: intermediate probability for each applicant equals applicant's Step D probability times quotient from (1) above.

F. Normalize the probabilities not altered in Step E (i.e., Group 3 – those with no media ownership preference) using the following formula: Intermediate probability of each Group 3 applicant equals .6 divided by number of Group 3 applicants.

G. Identify minority controlled applicants.

H. Multiply the intermediate probabilities of the minority controlled applicants by 2.0

I. Normalize all probabilities using: Final probability of selecting any applicant equals intermediate probability of applicant divided by sum of all intermediate probabilities.

## APPENDIX C

## INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603, (RFA) the Commission is incorporating an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the policies and proposals in this Further Notice of Proposed Rulemaking (Further Notice). Written public comments concerning the effect of the proposals in the Further Notice, including the IRFA, on small businesses are requested. Comments must be identified as responses to the IRFA and must be filed by the deadlines for the submission of comments in this proceeding. The Secretary shall send a copy of this Notice, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act.

**Reasons Why Agency Action is Being Considered:** The Commission has previously determined that traditional comparative hearing procedures are time consuming and burdensome and that the criteria used to select from among competing applicants for new noncommercial educational applicants were vague and difficult to apply. The Commission is seeking additional comments to refine existing proposals and to seek new ones in view of the Balanced Budget Act of 1997, which highlights the possible use of lotteries as an option and prohibits auctions for stations defined by Section 397(6) of the Act.

**Need For and Objectives of the Proposed Rule Changes:** With respect to channels reserved for noncommercial educational use, the Commission seeks to adopt a process for selecting noncommercial educational broadcast licensees that is clearer and more efficient than the 30-year-old system currently in place. The Commission also seeks to clarify whether and, if so, how noncommercial educational applicants can continue to apply for nonreserved "commercial" channels, in view of recent legislation that may both require auctions of those channels and limit the ability of noncommercial entities to participate in auctions. Our goals are to simplify and expedite the selection process, making it easier for applicants and for the Commission, while providing new and upgraded broadcast service to the public more quickly and maximizing participation by noncommercial applicants in our selections procedures to the extent authorized by the Act.

To accomplish these goals, the Further Notice seeks comment on (1) specific lottery and point system alternatives to existing NCE criteria and procedures; (2) a proposed minimum holding period for noncommercial educational broadcast permits awarded through the new procedures if the permittee received a preference in a lottery or prevailed over other mutually exclusive applicants as the result of having received more points in a point system; and (3) how to resolve competing applications for nonreserved spectrum that include one or more noncommercial applicants.

**Legal Basis:** Authority for the actions proposed in this Further Notice may be found in Sections 4(i), 303, 307, and 309(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, 307, and 309(i).

**Recording, Recordkeeping, and Other Compliance Requirements:** Under this proposal, prevailing noncommercial educational broadcast applicants would be required, during a holding period, to certify annually their continued eligibility for preferences and/or points awarded. Otherwise, the Further Notice does not relate directly to recording, recordkeeping, or compliance. However, to the extent that applicants keep records of their efforts to obtain or upgrade noncommercial educational stations, this proposal would reduce the number of records by eliminating and simplifying litigation involved in prosecuting a mutually exclusive application for a noncommercial educational broadcast facility.

**Federal Rules that Overlap, Duplicate, or Conflict with the Proposed Rules:** The rules proposed in the Further Notice would modify the procedures and standards for selection among competing applicants for noncommercial educational broadcast stations. The proposed rules do not overlap, duplicate or conflict with any other rules.

**Description and Estimate of the Number of Small Entities to Which the Rules Would Apply:**

1. Definition of a "Small Business"

Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions. 5 U.S.C. § 601(6). The RFA, 5 U.S.C. § 601(3), generally defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act, 15 U.S.C. § 632. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA"). Pursuant to 4 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

2. Issues in Applying the Definition of a "Small Business"

As discussed below, we could not precisely apply the foregoing definition of "small business" in developing our estimates of the number of small entities to which the rules will apply. Our estimates reflect our best judgments based on the data available to us.



An element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific radio or television station is dominant in its field of operation. Accordingly, the following estimates of small businesses to which the new rules will apply do not exclude any radio or television station from the definition of a small business on this basis and are therefore overinclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. As discussed further below, we could not fully apply this criterion, and our estimates of small businesses to which the rules may apply may be overinclusive to this extent. The SBA's general size standards are developed taking into account these two statutory criteria. This does not preclude us from taking these factors into account in making our estimates of the numbers of small entities.

With respect to applying the revenue cap, the SBA has defined "annual receipts" specifically in 13 C.F.R. § 121.104, and its calculations include an averaging process. We do not currently require submission of financial data from licensees that we could use in applying the SBA's definition of a small business. Nor to our knowledge is there revenue data for noncommercial educational broadcast stations available to us from other sources.

### 3. Estimates Based on Census Data

The rules proposed in this Further Notice of Proposed Rule Making will apply to television and radio stations licensed to operate on channels reserved as "noncommercial educational," and to competing applications for nonreserved spectrum that include noncommercial applicants. With respect to television stations, the Small Business Administration defines a television broadcasting station that has no more than \$10.5 million in annual receipts as a small business. Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Television stations that the Federal Communications Commission (FCC) would consider commercial, as well as those that the FCC would consider noncommercial educational, are included in this industry. Also included are other establishments primarily engaged in television broadcasting and which produce taped television program materials. Separate establishments primarily engaged in producing taped television program materials are classified under another SIC number.

For 1992 the total number of television stations that produced less than \$10.0 million in revenue was 1,155 of the 1,509 television stations then operating, both commercial and noncommercial, or 77 percent. Today, of the 1,569 total television stations, 367 are noncommercial educational. Thus, we estimate that the proposed rules will potentially affect 282 (77 percent of 367) noncommercial educational television stations that are small businesses. These existing stations would only be affected if they file an application for major modification of their existing facilities, and if another applicant files a mutually

exclusive application. These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television affiliated companies. On the other hand they may understate the number of small entities, because we believe that a larger percentage of noncommercial educational stations are small businesses than the percentage applicable to the television industry as a whole. We recognize that the proposed rules may also affect minority and women owned stations, some of which may be small entities. In 1997, minorities owned and controlled 38 (3.2%) of 1,193 commercial television stations in the United States. Comparable figures are not available for noncommercial stations. According to the U.S. Bureau of the Census, in 1987 women owned and controlled 27 (1.9%) of 1,342 commercial and noncommercial television stations in the United States. The proposal would also affect pending and future mutually exclusive applications for noncommercial television stations and any competing applicants, both on the reserved and non-reserved band. There are currently 91 pending applications for 26 channels reserved for noncommercial educational television usage. On the non-reserved band there are 16 commercial and 8 noncommercial television applicants competing with each other.

The proposed rule changes would also affect noncommercial educational radio stations. The SBA defines a radio broadcasting station that has no more than \$5 million in annual receipts as a small business. A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public. Radio stations that the Federal Communications Commission (FCC) would consider commercial, as well as those that the FCC would consider noncommercial educational, are included in this industry. Also included are entities which primarily are engaged in radio broadcasting and which produce radio program materials. However, radio stations which are separate establishments and are primarily engaged in producing radio program material are classified under another SIC number. The 1992 Census indicates that 96 percent of radio station establishments produced less than \$5 million in revenue in 1992. Official Commission records indicate that 11,334 individual radio stations were operating in 1992. As of January 31, 1998, official Commission records indicate that 12,241 radio stations are currently operating. Of that radio station total, 1,934 stations are noncommercial educational. Thus, we estimate that 1,856 (96%) of these noncommercial educational stations are small businesses, possibly more because we believe that a greater percentage of noncommercial educational stations are small businesses than of the radio industry overall. These existing stations would only be affected by the proposal if they choose to file applications for major modification of facilities and if their applications are mutually exclusive with the application of another noncommercial entity. Applicants for new NCE radio stations and any mutually exclusive commercial applications would also potentially be affected. There are currently 252 pending mutually exclusive groups of 699 applications on the reserved band, for noncommercial educational FM radio stations. On the non-reserved band there are 35 pending proceedings in which 171 commercial applicants are competing with 20 NCE applicants. We also note that this proposal will affect future applications. In 1997, the Commission received approximately 90

groups of 250 mutually exclusive NCE radio applications, including both new stations and major changes to existing stations, and we project that the number of mutually exclusive NCE radio applications filed in 1998 will be approximately 500. With respect to minority ownership of radio stations, no information is available for noncommercial stations, but it is available for commercial stations. In 1997, minorities owned 284 (2.8%) of 10,282 commercial radio stations.

We seek comment on these data and estimates regarding the number of small entities affected by the proposals in this Further Notice.

#### 4. Alternative Classification of Small Broadcast Stations

An alternative way to classify small television stations is by the number of employees. The Commission currently applies a standard based on the number of employees in administering its Equal Employment Opportunity ("EEO") rule for broadcasting. As of 1996, the most recent full year figures available to us, there were 4,243 broadcast stations with 4 or fewer employees, of which 138 were noncommercial educational television stations and 533 were noncommercial educational radio stations. These numbers may be overstated, due to the manner in which they are compiled for the Commission's own internal use.

**Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives:** This Further Notice solicits comment on a variety of alternatives discussed herein. Any significant alternatives presented in the comments will be considered. This Further Notice proposes to change the procedures and criteria used to select among competing applicants for noncommercial educational broadcast channels. This proposal would benefit all small noncommercial educational entities seeking a new or modified noncommercial educational broadcast facility by reducing and simplifying the administrative burdens associated with the traditional comparative hearing process. With respect to procedures, we seek comment on several options including a point system, and a lottery. We also seek comment on the criteria that should be applied in any procedure chosen. We seek comment on whether there is a significant economic impact on any class of small licensee or permittees as a result of any of our proposed approaches.

**Report to Congress:** The Commission shall send a copy of this Initial Regulatory Flexibility Analysis along with this Notice of Proposed Rule Making in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, codified at 5 U.S.C. § 801(a)(1)(A). A copy of this IRFA will also be published in the Federal Register.

**APPENDIX D**

**PARTIES COMMENTING IN MM DOCKET NO. 95-31 AND/OR ADDRESSING NCE  
ISSUES IN PREVIOUS GC DOCKET NO. 92-52**

Adventist Radio Network

American Family Radio

# University of Arizona, University of Wisconsin, Kent State University, Nevada Public Radio Corp., Northeastern Educational Television of Ohio, Ohio University, St. Louis Regional Educational and Public Television Commission, and WAMC.

# Association of America's Public Television Stations/National Public Radio

Bible Broadcasting Network

Tony Bono (BSB Communications)

California State University

Cedarville College

\* Georgia Public Telecommunications Commission

KCCU-FM (Cameron University)

KSBJ Educational Foundation

Montgomery Christian Educational Radio

Moody Bible Institute of Chicago

# National Federation of Community Broadcasters

National Religious Broadcasters

Ohio Educational Broadcasting Network Commission

\* Harry M. Plotkin

Real Life Educational Foundation

Southwest Florida Community Radio; Side By Side, Inc., Christian Broadcasting Academy, Living Faith Fellowship Educational Ministries, Illinois Bible Institute, and Radio Training Network

# Jimmy Swaggart Ministries

WBGW

# = Also filed in Former GC Docket No. 92-52    \* = Filed in GC Docket No. 92-52 Only

NOTE: We do not include as a commenter, Educational Information Corporation, licensee of Station WCPE(FM), Raleigh, North Carolina, which filed comments substantially past the comment deadline.

**SEPARATE STATEMENT OF  
COMMISSIONERS HAROLD FURCHTGOTT-ROTH AND GLORIA TRISTANI**

*In the Matter of Reexamination of the Comparative Standards  
for Noncommercial Educational Applicants – MM Docket No. 95-31*

We would not have sought additional comment on the question whether section 309(j)(2)(C) precludes us from using competitive bidding to award a broadcast license to a noncommercial educational broadcast or public broadcast station to operate on a commercial channel. We believe that Congress' mandate is clear: the Commission lacks authority to employ auctions to issue licenses to such stations, regardless of whether they operate on a reserved or on a commercial frequency. Since the statute is clear on its face, we are bound to give it effect. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

The express exemption to our competitive bidding authority in section 309(j)(2)(C) provides that such authority "shall not apply to licenses or construction permits issued by the Commission . . . for stations described in section 397(6) of this title." Section 397(6), in turn, defines the terms "noncommercial educational broadcast station" and "public broadcast station" as "a television or radio broadcast station which . . . under the rules and regulations of the Commission . . . is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association" or "is owned and operated by a municipality and which transmits only noncommercial programs for education purposes."

Nothing in section 309(j)(2)(C) limits the inapplicability of our auction authority to licenses issued for noncommercial and public broadcast stations *on reserved channels*. The statute makes no distinction between licenses granted to section 397(6) stations to operate on reserved spectrum and licenses granted to such entities to operate on unreserved spectrum; the prohibition on the licensing of these stations pursuant to auctions is, in this regard, unqualified. The statute makes plain that the Commission simply has no competitive bidding authority when it comes to licenses issued for stations described in section 397(6).

Similarly, nothing in section 397(6) limits the definition of noncommercial educational and public broadcast stations to those operating on reserved channels. Rather, section 397(6) defines the stations exempt from auctions under section 309(j)(2)(C) in terms of the station's *eligibility* under Commission rules to be licensed as a noncommercial educational or public broadcast station. And Commission rules do not require broadcast stations to operate only on reserved bands in order to be eligible for status as a noncommercial educational or public broadcast station. See 47 C.F.R. § 73.503. To the contrary, our rules specifically address the situation in which noncommercial educational

stations operate on unreserved channels. *See* 47 C.F.R. § 73.513.

Had Congress intended to limit the exemption for noncommercial educational and public broadcasters from competitive bidding to cases in which such broadcasters were applying for reserved frequencies, presumably Congress would have done so explicitly. Indeed, prior versions of both the House and Senate bills expressly provided for an auction exemption limited to "channels reserved for noncommercial use," but those limitations were eliminated prior to passage. *See* H.R. 2015, 105th Cong., 1st Sess., § 3301(a)(1); S. 947, 105th Cong., 1st Sess., § 3001(a)(1). Where Congress deletes limiting language from a bill prior to enactment, it may be presumed that the limitation was not intended. *See Russello v. United States*, 464 U.S. 16, 23-24 (1983). We would not read this limitation back into the statute.

We fully agree, however, that it is not clear how the exemption from our auction authority contained in section 309(j)(2)(C) should be implemented. The practical question of how to establish a process for awarding licenses to noncommercial educational and public broadcast stations without running afoul of section 309(j)(2)(C) is, admittedly, a difficult one. We also agree that there is a range of options for how the Commission could award broadcast licenses to stations described in section 397(6). But we write separately to state our view that one of those options should not be to force noncommercial educational and public broadcast stations seeking commercial frequencies to obtain their licenses through auctions.